circumstances the court may conclude by necessary inference that adultery was or must have been committed. A mere opportunity by itself is insufficient as it might or might not be be used, unless it was such an opportunity that on the facts an inference of adultery is irresistible. The court should be most reluctant to stretch its own imagination to draw an inference of adultery.

After this incident, the wife and the husband agreed to live apart, and on January 31, 1979, they executed a separation agreement before an advocate and solicitor in Bahau. Since then, relationship between the wife and the husband took a turn for the worse. It was stated in the husband's answer that the wife's father sued the husband to recover a sum of $800 on a dishonoured cheque for lack of funds issued by the husband to his father-in-law.

Let me now go back to the first incident alleged by the wife to have occurred in November 1978. The exact day of this incident was not pleaded in the amended petition. She could not also remember this important date in her oral evidence. Although very angry that Ai Lin was found in the husband's room, she still found time and mood to have lunch with Ai Lin, who denied the incident. There is no evidence to corroborate the evidence of the wife on this incident. There is also no evidence on what she did to demonstrate her disapproval and non-condonation after the alleged incident, unlike that on January 2, 1979, which was swiftly followed by the execution of the separation agreement at the end of that very month. On the balance of probabilities, I find as a fact that the incident in November 1978 did not take place.

I am thus left in a state of reasonable doubt as to the case of the wife. I am not satisfied beyond reasonable doubt that she had proved adultery. Even applying a lower standard of proof, that is proof on a balance or preponderance of probabilities, I am still of the view that the version of the husband and Ai Lin is the more probable and truthful one. At its very best, the evidence adduced by the wife is consistent with both the guilt and the innocence of the husband and Ai Lin, in which event, in fairness to them, the case of the wife must be held to be not proved. I therefore find that the wife had failed to prove that her husband committed adultery with Ai Lin.

I now come to the relief sought by the husband in his answer. The burden is on him to prove desertion and cruelty beyond reasonable doubt. Let me examine his evidence in support of his allegations of desertion and cruelty. Although after the marriage, the wife did not live with the husband in the matrimonial home at No. 77A, Batu Bakar, Bahau, there is evidence they met and slept together as husband and wife. In her letter of March 1, 1978, she addressed him in the most endearing term of "Dear Darling", signing off with an equally affectionate "Yours". They subsequently agreed to live apart as evidenced by the separation agreement of January 31, 1979, after which the period for desertion would cease to run. His idea of cruelty was that his wife denied him conjugal rights when she came to see him in Seremban. This allegation is hardly credible as he never challenged what she said in evidence that she had marital intercourse with him in Seremban and in Bahau. The husband frankly admitted he did nothing to apply to court for restitution of his conjugal rights. In any event, there is no evidence whatsoever that his mental or physical health had suffered in any way or there was a reasonable apprehension that injury to health would result from the alleged cruelty on the part of his wife. (See *Russell* v. *Russell*[6] and *Gollins* v. *Gollins*[7]). Even on a balance of probabilities, let alone proof beyond reasonable doubt, the husband had failed to prove desertion and cruelty.

I may observe that throughout the entire two-day hearing in these proceedings, not a single strand of evidence was given on any steps taken either by the wife or the husband to effect a reconciliation between them at any time right up to the second and final day of hearing concluded last Saturday.

In the result, the petition of the petitioner and the relief sought in the answer of the respondent are both dismissed, with no order as to costs against each other. The petitioner, however, must pay the costs of the 1st co-respondent and the proper disbursements and expenses of the 2nd co-respondent to be taxed by the proper officer of the court.

Petition dismissed.

Solicitors: *Ng, Tan & Kwang; Ismail Yassin & Lim; Koh Kim Leng & Co.*

MAT JUSOH BIN DAUD v. SYARIKAT JAYA SEBERANG TAKIR SDN. BHD.

[O.C.J. (Salleh Abas F.J.) January 19 & March 15, 1982]
[Kuala Trengganu — Civil Suit No. 78 of 1978]

Employment — Injury in course of employment — Whether worker employee of defendants or employee of contractor — Whether person is part and parcel of organisation — Whether employer guilty of negligence — Damages — Assessment — Workmen's Compensation Ordinance, 1952, s. 19.

Damages — Injury in the course of employment — Employers' negligence — General and special damages — Pretrial loss of earnings — Loss of future earning capacity.

In this case the plaintiff was employed as a sawyer in the plaintiff's sawmill. He was injured in the course of his employment and as a result lost three fingers of his right hand. Because of the injuries he was refused further employment at the defendant's sawmill. He was out of work for one year until he found employment as a labourer. He sued the defendants and claimed general and special damages. The defendant denied liability contending that the plaintiff was not their employee but the employee of the defendant's contractor Lim. In the alternative the defendants pleaded that even if the plaintiff was held to be their employee, the defendants were not liable because the accident was wholly caused by the plaintiff's own negligence. The defendants also pleaded contributory negligence by the plaintiff.

Held: (1) the documentary evidence in this case constituted a clear admission by the defendants that the plaintiff was their employee and this admission despite the evidence given by the witnesses for the defendants remained unrebutted;

(2) on the facts of the case, Lim could not be held to be a contractor within the meaning of section 19 of the Workmen's Compensation Act, as he was not undertaking to execute any part of the defendant's sawmill business. He was merely a middle man or agent to procure workmen for the defendants to be employed at the defendant's sawmill. The employer of the workmen must be the defendant for whose business they were employed;

(3) applying the test of organization it is clear that what was done by Lim and the workmen procured by him was done as an integral part of the defendant's business. Even on the question of control the ultimate authority to decide whether a log is sawn or not and how many logs were to be sawn obviously resided with the defendants who conveyed their decisions through their supervisors. In the circumstances the plaintiff must be held to be an employee of the defendants;

(4) on the facts of this case the defendants were guilty of negligence for not providing sufficient number of workmen to do the job and for not providing a proper and effective system of work;

(5) in this case the pre-trial loss of earnings should have been claimed as special damages. Even though the claim was wrongly made as general damages, the court could increase the special damages to include the pre-trial loss of earnings;

(6) having regard to the sums awarded in other cases and in particular to the injuries suffered by the plaintiff and the length of his stay in hospital, the sum of $15,000 would be allowed for pain and suffering and loss of amenities;

(7) in regard to loss of future earning capacity, the amount awarded should be $18,683.39;

(8) the general damages should be reduced to take into account the possibility of overlapping and the amount awarded should be $32,683.89.

Cases referred to:-

(1) *Sadler* v. *Henlock* (1855) 4 E. & B. 570; 119 E.R. 209.

(2) *Chye Hin Co. Ltd.* v. *Public Prosecutor* [1960] M.L.J. 137.

(3) *Morren* v. *Swinton & Pendlebury B.C.* [1965] 1 W.L.R. 576, 582.

(4) *Stevenson, Jordan and Harrison Ltd.* v. *Macdonald* [1952] 1 T.L.R. 101, 111.

(5) *Bank Voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248, 295.

(6) *Whittaker* v. *Minister of Pensions and National Insurance* [1967] 1 Q.B. 156.

(7) *Montreal* v. *Montreal Locomotive Work Ltd.* [1947] 1 D.L.R. 161.

(8) *Ready Mixed Concrete* v. *Minister* [1968] 2 Q.B. 497, 521.

(9) *Wilsons and Clyde Coal Co.* v. *English* [1938] A.C. 57, 78.

(10) *Murtadza bin Mohd. Hassan* v. *Chong Swee Pian* [1980] 1 M.L.J. 216.

CIVIL SUIT.

Mahinder Singh for the plaintiff.

S. Sivasubramanian for the defendant.

Salleh Abas F.J.: The plaintiff was employed as a sawyer at the defendants' sawmill at Kijal, Kemaman, Trengganu. On November 13, 1976 at about 8.00 whilst attempting to drag a piece of partially sawn log with another co-worker on to a waiting table for the purpose of further sawing it into planks, the log fell on his right hand. As a result of this accident he lost three fingers of his right hand, and because of the injuries he was refused further employment at the defendants' sawmill. He was out of work for one whole year until he finally found his present employment at Trengganu Development and Management Berhad (herein referred to as TDMB) as a labourer. He has been at this new job for the last four years, earning $7.55 per day. When he was a sawyer at the defendants' sawmill his earning was about $15 a day. He sued the defendants and claimed general and special damages.

The defendants denied liability contending that the plaintiff was not their employee but an employee of one Lim Yoke Yin (in this judgment referred to as Lim) who was the defendants' contractor within the meaning of section 19 of the Workmen's Compensation Ordinance, 1952. Further by way of alternative, the defendants pleaded that even if the plaintiff was held to be their employee, the defendants were still not liable, because the accident was wholly caused by the plaintiff's own negligence. The defendants also pleaded contributory negligence by the plaintiff.

As to the question whether the plaintiff was an employee of the defendants or that of Lim counsel for the plaintiff relied heavily upon exhibits P4, P5 and P6. P4 is a letter dated November 13, 1976 by the defendants addressed to the Assistant Director of Labour, Dungun, informing him of the accident and injuries to the plaintiff. P5 is a copy of a letter dated November 13, 1976 by the defendants to the American Insurance Company informing the latter of this accident. In both these letters the plaintiff was described by the defendants as "seorang pekerja potong papan", meaning a workman sawing planks.

Although these two letters do not say whose employee the plaintiff was, anybody reading them would certainly presume that the plaintiff was defendants' employee because the sawmill was the defendants' sawmill and it was the defendants who reported the accident. But a clearer picture, however, is to be found in exhibit P6. This exhibit consists of a Labour Department's form P.P.1 and P.P.2 which the defendants were required to fill pursuant to the report they made in P4. The defendants filled in the blank against the "Nama dan alamat majikan yang penuh" with the defendants' own name, namely "Syarikat Jaya Seberang Takir Sdn. Berhad, Kijal, Kemaman, Trengganu". The form was signed on behalf of the defendants' by the late father of the present Director of the defendants in charge of the daily affairs of the defendants' sawmill (DW1). In my view exhibits P4 and P5 and P6 constitute a clear admission by the defendants that the plaintiff was their employee and this admission despite the evidence given by witnesses for the defendants remains unrebutted.

I now proceed to consider the evidence in rebuttal.

The defendants claimed that the plaintiff was the employee of Lim (PW2) and that Lim was the defendants' contractor. Under cross-examination Lim claimed that there was a written contract between him and the defendants as to the engagement of workmen at the defendants' sawmill but he kept that document at home. If what he said is true, I would have expected the defendants to produce it, as this would naturally help their case. On the other hand the present director in charge of day to day affairs of the defendants (DW1) said nothing of the existence of such written agreement. It is thus obvious that Lim was lying when he said that there was a written agreement between him and the defendants.

Further DW1 appeared to be unsure of the true position of Lim in relation to the defendants' sawmill. Under cross-examination DW1 said —

"He (Lim) was a kepala (foreman) in charge of the sawing section. Lim Yoke Yin was employed by my company. Lim's salary was based on the amount of tonnage of timber sawn." (The brackets are mine).

But when he was further cross examined, DW1 changed this statement saying —

"Now Lim Yoke Yin is a sub-contractor. It was a slip of my tongue when I said that he was employed by my company."

But in answer to my question as to who the contractor was, since Lim was a sub-contractor, DW1 replied —

"Lim Yoke Yin took contract direct from my company. It is again my mistake when I said that Lim Yoke Yin is a sub-contractor."

It is thus obvious that DW1 was completely unsure as to the true status of Lim. Even Lim himself gave contradictory statements in his evidence. He said in evidence-in-chief:—

"I know Toh Lam Eng (DW1) because his late father was my employer before at Syarikat Jaya Seberang Takir Bhd."

But later under cross-examination he changed his statement saying:—

"I do not agree that I was employed by the defendants' sawmill, but I agree that I was being paid on the basis of the production."

It is clear to me that these two witnesses were not prepared to tell the truth as to the true position of Lim and the plaintiff in the defendants' organisation. Their denials that the plaintiff was an employee of the defendants were just as worthless as their assertions that Lim was the defendants' independent contractor. That being the case the admission by the defendants in exhibits P4, P5 and P6 that the plaintiff was the employee and that the defendants were his employer remains unrebutted.

Quite apart from these exhibits, the plaintiff's evidence as to how he was recruited, and how he worked and how he was paid clearly shows that he was an employee of none other than the defendants. This evidence was not seriously challenged by the defendants and I see no reason why I should not accept it as true for determining the position of the plaintiff in relation to the defendants. According to the plaintiff, some five months before the accident he arrived at the sawmill looking for job. He met Lim for the first time at the sawmill canteen and after enquiring from him as to the availability of work he was asked by the latter to see a clerk in the office of the sawmill. The clerk whom he subsequently saw at the office was a female Chinese clerk, whose name he did not know. This clerk asked him to begin work the next day, and he did start work as told and continued working regularly until he finally stopped because of the accident. He received his wages from the sawmill clerk and signed a check-roll to signify receipt of his wages. He worked under a Chinese worker who gave him instruction and he called this Chinese worker a Kepala. Lim never gave him any instruction at all. There is not even a suggestion by Lim or the defendants that the clerk at the sawmill was Lim's employee. This clerk therefore must be the defendants' employee and whatever was done by the clerk in recruiting and paying wages to the plaintiff must be so done on behalf of the defendants. Thus it is now as clear as day that the plaintiff was an employee of the defendants.

The defendants' case that the plaintiff was not their employee was based on their allegations that the plaintiff was engaged by Lim and that it was Lim who paid the plaintiff and his colleagues from the earnings which Lim received from the defendants on the basis of tonnage sawn. I now advert to this aspect of the matter.

The defendants averred in their defence that Lim was the contractor within the meaning of section 19 of the Workmen Compensation Act, 1952 and that the plaintiff was therefore not their employee but Lim's employee. Section 19 deals with the liability of a person called "the principal" to pay Workmen Compensation under the Act in respect of workmen employed by another called "the contractor". The principal is liable if a contract between him and the contractor is one "for the execution by or under the contractor of the whole or any part of any work undertaken by the principal." Thus before Lim could be held to be a contractor of the defendants under this section the contract between them must be one for the execution by Lim of a part or the whole of the defendants' sawmill business. Let us now look at the evidence.

The defendants claimed that except for four persons employed as administrative staff, three supervisors and three storekeepers, all other workers including the plaintiff employed at the defendants' sawmill were not their employees. These workers were not engaged by them but by three contractors, one of whom was Lim. The defendants' sawmill had six mechanical saws, each of which was manned by a group of four workmen. Lim contracted with the defendants to procure workmen and assign them to the particular saws where they had to work. These workmen worked by shifts. The defendants paid Lim a commission at the rate of $13 per ton for every ton of timber sawn by the workmen. This commission was then divided between Lim and the workmen in the ratio of 10% for Lim, 28% for Grade I worker, 20% for Grade II worker, 16% each for Grade III and Grade IV workers and 10% for the worker who was sharpening the saw blades. Lim paid these workmen from the commission he received from the defendants. The plaintiff's share was 20%. These workmen worked fairly independently. Lim gave them no instruction and neither did he supervise their work. But the defendants' supervisors wrote their instructions as to the types, sizes and quantities of logs and planks to be sawn on a blackboard. It was in accordance with these instructions that these workmen performed their jobs. Lim was thus purely a procurer of workmen and for such service he collected 10% of the commission paid for each ton of timber sawn by the workmen. Lim did not own any tools and equipment used at the sawmill, and neither did he possess an independent source of finance to pay the earnings of the workmen. The workmen were in fact paid by the defendants through Lim.

On the facts of this case I hold that under no circumstances could Lim be held to be a contractor, within the meaning of section 19 of the Workmen

Compensation Act as he was not undertaking to execute any part of the defendants' sawmill's business i.e. to saw the defendants' logs into planks. He was merely a middleman or an agent to procure workmen for the defendants to be employed at the defendants' sawmill and as such these workmen could not be held to be Lim's employees just because they were engaged or recruited by him. The employer of these workmen must be the defendants for whose business they were employed. The sawmill was not Lim's business but the defendants' and it is the defendants who owned the logs and the machines at the sawmill and it is the defendants who paid the earnings of these workmen, albeit through Lim. The fact that the workmen's earnings were not calculated by hours of work, but on the basis of tonnage of timber sawn by them does not make any difference. See *Sadler* v. *Henlock.*[1] There is thus no substance in the defence averment that Lim was a contractor and the defendants his principal within the meaning of section 19 of the Workmen Compensation Act or under common law.

Counsel for the defendants referred me to *Chye Hin Co. Ltd.* v. *Public Prosecutor*[2] in which the facts were almost similar to those in the present case. That case dealt with the question of liability of the appellant company to pay EPF contributions in respect of sawyers working at their sawmill. Smith J. held that as these sawyers were not subject to control and direction of the appellant company, they were not employed under a contract of service, but under a contract for services, and as such the appellant company was therefore not liable to pay EPF contributions.

With respect I am not persuaded to accept the conclusion and findings of Smith J. in *Chai Hin Co. Ltd.'s* case because the decision in that case is distinguishable both on fact and law. In the present case there were the unrebutted admissions by the defendants and also the plaintiff's own evidence which, I accept as true, showing that the plaintiff was their employee. Furthermore there is nothing in the judgment of the learned judge which indicates that he ever considered tests other than the test of control for the purpose of determining the existence of master and servant relationship.

The notion of control as a test to determine the existence of relationship of master and servant has lost a good deal of its importance because under modern conditions no control as to how work is to be done can be directed to such professionally trained employees as engineers, architects, lawyers, managers, doctors and many others. *Morren* v. *Swinton & Pendlebury B.C.*[3] This notion is also becoming unrealistic because the majority of employers today are corporate entities who have to act through human agencies. Thus the absence of control is no longer conclusive as to the existence or otherwise of the relationship of master and servant. Various attempts were made at finding a satisfactory test. One such test is stated by Denning L.J. in *Stevenson, Jordan and Harrison Ltd.* v. *Macdonald*[4] as follows: —

"It is often easy to recognize a contract of service when you see it, but difficult to say wherein the distinction lies. A ship's master, a chauffeur and a reporter or a staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi man and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that under a contract of services, a man is employed as part of the business, and his work is done as an integral part of the business, whereas under a contract for services, his works, although done for the business, is not integrated into it but is only accessory to it."

This test was repeated by Denning L.J. in *Bank Voor Handell en Scheepvaart N.V.* v. *Slatford*[5] as follows:

"The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization."

Mocatta J. applied this organisation test in *Whittaker* v. *Minister of Pensions and National Insurance*[6] and came to the conclusion that a trapeze artiste, engaged by a circus company to perform trapeze act and also to be an usherette was employed under a contract of service as her performance was an integral part of the business of the circus.

Another test was suggested by Lord Wright in *Montreal* v. *Montreal Locomotive Works Ltd.*[7] as being appropriate in some cases. This is a composite test involving elements of (1) control, (2) ownership of the tools, (3) chance of profit and (4) risk of loss. In other words the test which can be applied should be wide enough to cover the taking of account of investment and risk. Thus he who owns the assets and bears the risk is unlikely to be acting as an agent or a servant. Such person in fact could be described as carrying on his own business. *Ready Mixed Concrete* v. *Minister*[8] *per* MacKenna J. at page 521.

Applying the test of organization laid down by Denning L.J. quoted above, it is clear that what was done by Lim and the workmen procured by him was done as an integral part of the defendants' business. Lim procured the workmen for the defendants' business, and the workmen cut or split the logs also for the business of the defendants. Under no circumstances could they be held to be working for Lim. After all the essence of a contract of service is the supply of labour and skill by a servant to the master. It is to the defendants and not to Lim that these workmen supplied their service and skill. Even on the question of control, the ultimate authority to decide whether a log was to be sawn or not and how many logs were to be sawn obviously resided with the defendants who conveyed their decisions through their supervisors. In the circumstances I therefore have no hesitation to hold that the plaintiff was an employee of the defendants.

Reverting to *Chye Hin Co. Ltd.'s* case, with respect to Smith J. before whom I often appeared as a Deputy Public Prosecutor or a Federal Counsel in the early years of my career in the Attorney-General's Chambers and under whom I received much guidance, I do not think that the learned judge was right in deciding that case purely on a test of control without having regard to the test of integral part of organization propounded by Lord Denning in 1952 in *Stevenson, Jordan & Harrison Ltd.* v. *Macdonalds* and in 1953 in *Bank Voor Handell en Scheepvaart N.V.* v. *Slatford* and Lord Wright's fourfold composite test in *Montreal* v. *Montreal Locomotive Works Ltd.* (1967) and the statement of Lord Parker C.J. on

the diminished importance of the test of control in *Morren* v. *Swinton Pendlebury B.C.*

I now come to the second issue in this case — i.e. whether the defendants as the plaintiff's employer were guilty of negligence.

The law requires an employer to take reasonable care so to carry on operations as not to subject the persons employed to unnecessary risk, i.e. a duty not to subject the employee to any risk which the employer can reasonably forsee and which he can guard against by any measure, the convenience and expense of which are not entirely disproportionate to the risk involved. This duty was particularized by Lord Wright in *Wilsons and Clyde Coal Co.* v. *English*[9] as threefold:— (1) the provision of a competent staff of men, (2) adequate material and (3) a proper system and effective supervision. Whilst this duty is not absolute, it is however, not fulfilled by entrusting its fulfilment to employees, even though these are selected with due care and skill.

Let us now see the evidence as to how the accident happened. On the morning of November 13, 1976 there was a shortage of sawyers. The plaintiff who had completed his previous night shift was asked by Lim to work again in place of a sawyer who was away on leave that morning. As a good and obedient employee he reported for duty as requested and was assigned to a saw which was not his usual working saw. Further instead of the usual set of four workmen to perform the sawing activities, there were only three workmen including the plaintiff himself. Not only was the saw not his usual working saw, the other two co-workmen were also not his usual working colleagues. Of the two workmen working with him on that morning, one was attending to the mechanical saw, whilst the other workman was assisting the plaintiff to drag a piece of partially sawn log on to a table which was movable on rails so that the log emplaced on it could be pushed towards the waiting revolving saw and thus cut it into planks. The partially sawn log had to be dragged on two supporting logs, which were well oiled to facilitate the dragging. Normally there would be three persons doing this job, but as there was a shortage of workmen on that morning, only the plaintiff and the other workman were doing this extremely delicate and hazardous operation. The crane which was supposed to assist in lifting heavy logs was not there, but at the yard some distance away where sawn planks were being stacked. The job of dragging the log on to the table was extremely delicate and hazardous because of the weight of the log and moveability of the table on to which the log was to be placed. There was clear evidence that there was no device fitted to the table to prevent it from moving or to secure it in position as the log was being dragged on to it. Whilst the plaintiff and his co-worker were dragging the log on to the movable table, by accident the log hit the table off its position. Both the plaintiff and his co-workmen lost control and balance and as a result the log fell hitting the plaintiff on his right hand. He thus received injuries.

On this evidence I have no difficulty in holding that the defendants were guilty of negligence. In the first place, they were guilty because they were not providing sufficient number of workmen to do the job. There should have been a fourth workman to work with the plaintiff on that morning. Secondly the defendants were also guilty because they were not providing proper and effective system of work which could have been easily foreseen but for their indifference. That there was no device to keep the movable table in position whilst the log was being dragged on to the table, and then neither was there any provision to assist the placing of the log on to the table by mechanical means instead of primitive method of using brute human strength, more so when there was insufficient number of workmen to do the job, all these are grounds for holding the defendants guilty of negligence.

In their defence the defendants pleaded that they were not guilty of negligence because the plaintiff was wholly negligent or at least guilty of contributory negligence. I confess I find no evidence to support these allegations of complete and contributory negligence on the part of the plaintiff. Surely the plaintiff's willingness to work in the morning, after he had completed his previous night's shift, could not be regarded as a contributory factor to hold him negligent. He might be moved by the desire to earn extra money, but such willingness should be rewarded rather than punished, because it involved a sacrifice of comfort and rest on his part. The failure of the plaintiff to call the crane to assist in the lifting of the log also could not be held against him. According to the plaintiff's evidence at first the crane lifted an unsawn log to a bigger table, but after this log had been sawn into two halves the crane moved away and did not wait there to assist in lifting the partially sawn log on to a smaller table. Apparently the system of work was such that a discretion was left to the workmen whether or not they should get the assistance of the crane in transferring the half sawn log on to the table. The willingness of these workmen to do the job without the help of the crane and the wrong judgment they made as to their ability and strength to handle the log could not also be held as a factor against him because such judgment and work really eminated from a system which was itself unsafe. The system of paying the workmen according to the tonnage of planks sawn must have spurred these workmen to drag the log without the assistance of the crane. If the crane service was required each time such log was to be placed on to the table, there being no evidence showing that there was more than one crane available, much time would be wasted and less tonnage would be produced and subsequently less money would be earned and presumably the mill itself would not be operational for lack of equipment. The defendants therefore could not complain nor could they escape liability from their primary responsibility of providing a safe and effective system of work. When they failed to provide such system the defendants could not be heard to say that their employees should exercise more care not to injure themselves, otherwise they had only themselves to blame. Such a plea makes nonsense of the employer's responsibility.

I therefore hold that the defendants are wholly responsible for the injuries suffered by the plaintiff.

I now come to the question of assessing the quantum of damages. The plaintiff claimed by way of special damages (1) a sum of $300 as his travelling expenses between his house and hospital and (2) a sum of $1,078 as a loss of earnings for the first three months after the accident as the rate of $326 per month.

As to the hospital travelling expenses it is on record that the plaintiff was admitted to Kemaman Hospital and later to Kuantan General Hospital. He remained in hospital for five days until he was discharged on November 18, 1976. He was asked to come back to the hospital for further check up on November 29, 1976 and he did. Kijal and Kuantan are about 60 to 70 miles apart. Although there is no evidence to show whether members of his family made trips to see him in hospital I assume that they must have done so, having regard to the custom and concern of the people in this country, particularly rural folks towards their sick relatives. I therefore consider that a sum of $200 would not be inappropriate in the circumstances to reimburse the travelling expenses of the plaintiff and his relatives.

The plaintiff's actual earnings six months prior to the accident, according to form P.P.2 exhibit P6 were as follows:

May 1976	$298.90
June 1976	$346.80
July 1976	$402.40
August 1976	$322.90
September 1976	$232.80
October 1976	$334.60

Thus the average earning for a month was $326. The sum of $1,078 claimed by the plaintiff represents loss of earnings for the three months following the date of the accident. I fail to understand why the claim was particularized to be that sum only, when it is clear that the plaintiff was out of work for one whole year and that during that whole year he visited the defendants' sawmill three times to inquire about work but three times he was refused employment because of the injuries to his hand, and therefore suffered reduction in his earnings. However, counsel for the plaintiff in his submission on claim for general damages divided the claim for loss of earning capacity into two parts — pre-trial loss of earning capacity and post-trial loss, and asked for a sum of $9,450 as a pre-trial loss of earning capacity from the date of the accident to the date of trial to be awarded to the plaintiff.

In this case the pre-trial loss is not really a loss of earning capacity but loss of actual earnings as a direct result of the accident. This pre-trial loss is sufficiently proved by the fact that the plaintiff suffered reduction in his earnings at the rate of $7.45 a day or $150 per month. This reduction began from the date when he started to work in the present employment. From that date to the date of the trial is four years and the total sum for four years is $150 times 48 months, i.e. $7,200. The amount calculated by counsel for the plaintiff is $9,450, arrived at by multiplying $150 by 60 months. This computation cannot be correct, because in the first one year after the accident, the plaintiff suffered total loss of earnings as he was not employed at all; and it was only in the second year when he began to work that he suffered partial loss, or reduction in earnings.

In view of *Murtadza bin Mohd. Hassan* v. *Chong Swee Pian*[10] the inclusion of this loss under general damages is misconceived because it is a species of special damages and it should therefore be added to and treated with the claim for loss of earnings prior to the date of the trial. The amount of pre-trial loss of earnings should thus be as follows:—

(1) Loss of earning for one whole year from the date of accident to the date of present employment by Trengganu Development and Management Bhd. (TDMB) at $326 per month	$326 x 12 = $ 3,912.00
(2) Loss of earning for subsequent four years from the date of employment by TDMB to the date of trial at $150 per month	$150 x 48 = $ 7,200.00
Total loss of earning prior to the date of trial	= $10,528.00

The question which confronts me at the moment is this, i.e. whether I could increase the special damages to an amount exceeding the sum pleaded in the statement of claim. It must be observed that the amount of excess was not one that was not asked for. Counsel for the plaintiff, because of the mistaken view he formed of the matter asked for this amount as part of the plaintiff's claim for general damages and so he did not include it, nor did he rightly calculate the amount of special damages asked for in the pleadings. In my view since the amount of loss was proved by evidence justice demands that I should ignore the figure pleaded. After all if a judge can reduce the amount pleaded because of the effect of the evidence he surely is entitled to increase the amount if the evidence warrants it. I therefore award the amount of loss of earnings from the date of the accident to the date of the trial — $10,528 and with this award there is no question of allowing the pre-trial loss of earning capacity estimated by counsel for the plaintiff to be $9,450.

As regards general damages these fall under the following headings:

(i) pain and suffering and loss of amenities, and
(ii) loss of earning capacity.

A survey of Singapore cases involving similar injuries show that the damages awarded for pain and suffering and loss of amenities range between $10,000 and $25,000 whilst a similar survey of Malaysian cases show that the awards vary between $8,250 and $20,410. At page 1 of the Bundle of Agreed Documents exhibit P1 Dr. Penny Tevaraj, Medical Officer, Kuantan General Hospital reported as follows:

"The above named patient was admitted on November 13, 1976 with:—

(1) fracture of terminal phalynx of right Index finger.
(2) fracture middle phalynx of middle finger.
(3) Dislocation of proximal interphalangeal joint of right Ring finger with tendon cut.
(4) fracture proximal phalynx and laceration of tip of finger.

Toilet and suture was done with disarticulation of Index and middle fingers, and patient was given antibiotics and discharged on November 18, 1976. Patient was followed up on

November 29, 1977 and wound was found to be infected. Patient did not turn up for further follow up."

The loss of two middle fingers and part of the index finger of the right hand makes it very difficult for the plaintiff to lift or carry heavy objects. For this reason he was refused employment by the defendants. The plaintiff is a labourer and the use of the right hand must be of very great importance to him. Therefore having regard to the sums awarded in other cases for similar injuries and in particular to the injuries suffered by the plaintiff and the length of his stay in hospital, I assess a sum of $15,000 for pain and suffering and loss of amenities.

Regarding the loss of future earning capacity, the plaintiff was 26 years old at the time of the accident and therefore 31 years old at the date of trial. Assuming that he would cease working at the age of 55, he still has 24 years of working life. It is a fact that he suffered reduction in his earnings at a rate of $150 a month and this reduction is continuing and I have no doubt that he will continue to suffer this disadvantage in the future. In calculating damages under this heading, I give 15 years' purchase in order to take into account all future contingencies. Thus according to the annuity table at page 1015 of *Dass* Volume II the loss of earning capacity should be $18,683.39.

The total sum for general damages is therefore $33,683.39, i.e. ($15,000 + $18,683.39). This figure to my mind should be further reduced in order to take into account any possibility of the overlapping. I consider a reduction of $2,000 to be appropriate leaving the amount awarded for general damages to be a global sum of $32,683.39.

Finally the sums awarded to the plaintiff are as follows:

(i) $200 travelling expenses;
(ii) $11,152 as pre-trial loss of earnings;
(iii) $32,683.39 as general damages;
(iv) interest at 3% on the total of sum in paras. (i) and (ii) from the date of accident to the date of realization; and
(v) interest at the rate of 6% on the sum of $32,683.39 from the date of the service of writ to the date of realization.

I therefore enter judgment for the plaintiff as above and costs.

Claim allowed.

Solicitors: *Mahinder & Co.; S. Sivasubramanian.*

DORIS RODRIGUES v. BALA KRISHNAN

[O.C.J. (Ajaib Singh J.) November 1, 1979 & January 17, 1980] [Seremban — Civil Suit No. 219 of 1976]

Contract — Breach of promise to marry — Claim for damages — Whether action maintainable — Contracts Act 1950.

Matrimony — Breach of promise to marry — Whether action for damages maintainable — Non-applicability of English Law Reform (Miscellaneous Provisions) Act 1970 — Civil Law Act 1956, s. 5(1) — Contracts Act 1950.

The plaintiff's claim against the defendant was for breach of promise to marry. Evidence revealed that she had lived with the defendant as husband and wife for several years. Subsequently the defendant forsook her to marry another woman. The plaintiff claimed for damages.

Held, allowing the plaintiff's claim: (1) the English Law Reform (Miscellaneous Provisions) Act 1970 which abolished actions for damages for breach of promise of marriage is not applicable in Malaysia by virtue of the Civil Law Act, 1956 and the Contracts Act 1950.

(2) there is no requirement under the Evidence Act 1950 that the plaintiff in such an action should have her evidence corroborated;

(3) the plaintiff had proved to be a witness of truth and her claim for damages for promise of marriage would be allowed.

CIVIL SUIT.

Gurdial Bakan Singh for the plaintiff.

N. Ramachandran (*K. Gunaretnam* with him) for the defendant.

Cur. Adv. Vult.

Ajaib Singh J. (delivering decision): On the submissions that have been made in this case several issues call for determination. First whether or not an action for breach of promise of marriage is maintainable in this country. Mr. Ramachandran for the defendant has made some research on the position in England and he has submitted that the Law Reform (Miscellaneous Provisions) Act 1970 has abolished actions for damages for breach of promise of marriage.

Mr. Ramachandran submitted that by virtue of section 5 of the Civil Law Act 1956 (Revised 1972) this English Act is applicable here and therefore from the date of the coming into force of the Revised Civil Law Act 1956 which is April 1, 1972 actions for breach of promise of marriage are no longer maintainable in Malaysia.

I am afraid I cannot agree with Mr. Ramachandran on this point. First of all under section 5(1) of the Civil Law Act the law in England would be applicable here as stated in that section but only if no equivalent law was available in Malaysia. However we have the Contracts Act 1950 (Revised 1974) which covers contracts which include promise to marry. Secondly the Law Reform (Miscellaneous Provisions) Act 1970 cannot be applicable here even if section 5(1) did not provide a local remedy for breach of promise of marriage because any laws of England which could be applicable by virtue of section 5 of the Civil Law Act would be those in existence at the date of coming into force of the Civil Law Act 1956 which is April 7, 1956 and not April 1, 1972 which is the date of coming into force of the revised version.

Secondly on the question of corroboration there is no requirement under our law that the testimony of the plaintiff in an action for damages for breach of promise of marriage should be corroborated by independent material evidence as was the requirement in England. Until the actions for damages for breach of promise of marriage were abolished in 1971 the English law required corroboration of the plaintiff's evidence by virtue of section 2 of the Evidence Further Amendment Act 1969 which states that the testimony of the plaintiff should be corroborated by some other material evidence in support of the promise of marriage. Under our Evidence Act 1950 there is no such requirement that the plaintiff in such an action should have her evidence corroborated.